FILED
JAN 25 1951
CHARLES ELMORE [illegible]
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 512

HIRAM REYNOLDS,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LORCH AND LORCH,
FRANK E. LORCH,
EVAN A. MCLINN,
517-521 Elsby Building,
New Albany, Indiana,
Attorneys for Petitioner.

INDEX

	Page
Petition for Writ	1
A—Jurisdiction	1
B—Summary Statement of Matters Involved	2
C—Questions Presented	2
D—Reasons Relied on for Allowance of Writ	2
Brief in Support of Petition	5
I—Opinion of the Court Below	5
II—Jurisdiction	5
III—Statement of the Facts	6
IV—Question Presented	6
V—Summary of Argument	6
VI—Argument	6
VII—Conclusion	13

Table of Cases

Erie Railroad Company v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188	2, 3, 7, 13
Cushman Motor Delivery Co. v. *McCabe*, 219 Ind. 156; 36 N. E. 2nd, 769	8
Baltimore and Ohio Railroad Co. v. *Reyher, Admrx.*, 216 Ind. 545; 24 N. E. 2nd, 284	8
Bartley v. *Chicago & E. I. Ry. Co.*, 216 Ind. 512; 24 N. E. 2nd, 405	8, 11, 13
Dommer v. *Pennsylvania R. R. Co.* (1946), 156 Fed. 2nd, page 716	8, 10, 11
Coats v. *Strawmeyer*, 107 Ind. App. 102; 21 N. E. 2nd, 433	10
Heiny v. *Pennsylvania R. R. Co.*, 221 Ind. 367; 47 N. E. 2nd, 145	12
Pennsylvania R. R. Co. v. *Dove*, 184 Ind. 447; 111 N. E. 609	13

Statutes

Burns Indiana Statutes, Acts 1899, Ch. 41, Sec. 1, Page 58	7
Title 28, United States Code, Sec. 1254	1
Burns Indiana Statutes, Sub-Sections A & D, Section 47-2004	8, 9
Burns Indiana Statutes, 1933, Section 2-1025	10
Burns Indiana Statutes, 1933, Section 10-1909	12
107 Ind. App. page 105; 21 N. E. 2nd, page 435	10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 512

HIRAM REYNOLDS,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Hiram Reynolds respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on the 23rd day of October, 1950, petition for rehearing having been denied December 4th, 1950.

A

Jurisdiction

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254. The decision of the

United States Court of Appeals for the Seventh Circuit was rendered on October 23, 1950. Petition for rehearing denied December 4, 1950.

B

Summary Statement of Matter Involved

Petitioner was permanently injured in a collision between petitioner's automobile and defendant's locomotive at a railroad crossing. Upon the trial of this cause in the District Court the jury rendered a verdict for the plaintiff in the sum of $10,000.00. Defendant's motion for a directed verdict at the close of the plaintiff's evidence and at the close of the defendant's evidence was overruled by the Court. This judgment was appealed to the United States Circuit Court of Appeals, Seventh Circuit, which Court reversed said judgment in an opinion rendered on the 23rd day of October, 1950, and denied a petition for rehearing on December 4, 1950.

C

Questions Presented

The sole question presented is whether the Court of Appeals for the Seventh Circuit erred, when it held that the plaintiff in a personal injury negligence action must prove himself free from contributory negligence as a prerequisite to recovery, by failing to follow the State statutes and decisions of the State of Indiana in a matter of general law as Federal Courts are required to do by the rule laid down by the United States Supreme Court in the case of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64.

D

Reasons Relied On for Allowance of Writ

The United States Court of Appeals for the 7th Circuit in the instant case has rendered a decision on an important

question of the law of the State of Indiana in a way *directly in conflict* with applicable Indiana statutes and decisions. The Court of Appeals for the Seventh Circuit, in the instant case, held that the plaintiff in a personal injury negligence action must prove himself free from contributory negligence as a prerequisite to recovery. However, it is firmly established both by specific statutes and decisions of the highest court of Indiana that contributory negligence in a personal injury case in Indiana is a matter of defense with the burden of proof resting on defendant, and that when reasonable minds might differ as to the facts it is proper to submit the question of contributory negligence to the jury. By its decision in the instant case, the Court has failed to follow the controlling rule laid down by the United States Supreme Court in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, which requires Federal Courts to follow State decisions and statutes on matters of general law.

A supporting brief accompanies this petition.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered by that Court in this cause on the 23rd day of October, 1950, and that said judgment be reversed by this Honorable Court, and that the cause be remanded to the District Court with directions that judgment be entered on the verdict of the jury, with interest from the 19th day of October, 1949, the date of the rendition of the verdict.

FRANK E. LORCH,
EVAN A. MCLINN,
517-521 Elsby Building,
New Albany, Indiana,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 512

HIRAM REYNOLDS,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Defendant

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the United States Court of Appeals for the Seventh Circuit will be found in Record Pages 127 to 132, reported in (185 Fed. 2nd P. 27).

II

Jurisdiction

The jurisdiction of the court is invoked under Title 28 U. S. C. A., Section 1254.

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit to be reviewed was entered

on October 23, 1950. Petition for rehearing was denied December 4, 1950.

III

Statement of the Facts

The statement of the case appears under heading (B) of the petition for writ of certiorari. In the interest of brevity this statement is not here repeated, but by reference thereto is incorporated herein.

IV

Question Presented

The question specifically brought forth by the petition for writ of certiorari appears under the heading (C) of the petition. Again in the interest of brevity this statement is not repeated here, but by reference thereto is incorporated herein.

V

Summary of Argument

To hold as the Court of Appeals for the Seventh Circuit did in this case, that before the plaintiff can recover for personal injuries sustained in a railroad crossing accident, under the law of Indiana he must prove himself free from contributory negligence, is in direct conflict with all of the statutes and decisions of the State of Indiana on that subject.

VI

Argument

The Court of Appeals for the Seventh Circuit held that it must decide this case in accordance with the law of Indiana, and that under that law plaintiff as a prerequisite to recovery is required to show that at the time and place of

the accident he was in the exercise of due care and caution for his own safety, or, in other words, that he was free from negligence which contributed to the cause of this accident (R. P. 130).

Section 2-1025 of Burns Indiana Statutes, Acts 1899, Ch. 41, Sec. 1, Page 58 provides:

> "Personal injuries-Contributory negligence.—Hereafter in all actions for damages brought on account of the alleged negligence of any person, copartnership or corporation for causing personal injuries, or the death of any person, it shall not be necessary for the plaintiff in such action to allege or prove the want of contributory negligence on the part of the plaintiff, or on the part of the person for whose injury or death the action may be brought. Contributory negligence on the part of the plaintiff, or such person, shall be a matter of defense, and such defense may be proved under the answer of general denial; Provided, That this act shall not affect pending litigation."

This statute makes contributory negligence on the part of the plaintiff a matter of defense and places the burden of proof of contributory negligence on the defendant. The decision of the Circuit Court of Appeals, Seventh Circuit, shifts the burden of proof of contributory negligence from the defendant to the plaintiff which is in direct conflict with the law of the State of Indiana.

The United States Supreme Court held in the case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, that it is the duty of the Federal Courts to follow state decisions on matters of general law, and petitioner respectfully submits that the Indiana law is that contributory negligence is a matter of defense, and the burden of proof is on defendant in personal injury actions. Contributory negligence in personal injury actions in Indiana is a question of fact for the jury, and it is only

where facts are undisputed and where but a single inference can be drawn from the facts that the court can say as a matter of law that certain acts do or do not constitute contributory negligence.

Cushman Motor Delivery Co. v. *McCabe,* 219 Ind. 156; 36 N. E. 2nd, 769;

Baltimore and Ohio Railroad Co. v. *Reyher,* Admrx. 216 Ind. 545; 24 N. E. 2nd, 284;

Bartley v. *Chicago E. & I. Ry. Co.,* 216 Ind. 512; N. E. 2d 405;

Burns Indiana Statutes 2-1025.

This was recognized as being the law of Indiana on contributory negligence in personal injury cases by this same Court of Appeals for the Seventh Circuit, in the case of *Dommer* v. *Pennsylvania R. R. Co.* (1946), 156 Fed. 2nd, 716.

In the instant case, the train was not occupying the crossing ahead of plaintiff as he approached, and there is no showing in the evidence that plaintiff failed to look and listen for approaching trains. There is no showing that plaintiff drove blindly into a place of known danger.

The Court says in the instant case, furthermore, it appears that at the time and place of the collision plaintiff was operating his automobile in violation of the Statutes of the State of Indiana, and quotes Sub-sections A and D of Section 47-2004, Burns Statutes. In this connection may we call the Court's attention to the fact that the train was neither on or near, or entering the highway *in compliance with legal requirements, and with the duty of all persons to use due care.* Sub-section D is dependent on Sub-section A in that the duty imposed on a driver of a vehicle shall be consistent with the requirements of Sub-section A, and that he shall drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing.

Careful examination of the record will reveal that there is no evidence in this case indicating that plaintiff was operating his automobile in violation of this statute. The Court further says that under the law of Indiana, it is negligence as a matter of law to operate a motor vehicle on a highway at a rate of speed in excess of that within which the operator can bring to a stop within the range of his vision.

Careful examination of the record will reveal that there is no evidence in the record that plaintiff could not bring his automobile to a stop within the range of his vision.

Defendant has contended, and the Court in this case has held, that plaintiff was guilty of contributory negligence as a matter of law because he was in violation of Section 47-2004 of the Statutes of the State of Indiana.

Petitioner submits that the cases cited by the Court and the defendant in support of this proposition do not sustain such a view. All of these cases involve factual situations which are very different from the instant case.

There is no proof that plaintiff was driving his vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards than existing, or that his speed was not so restricted as may be necessary to avoid colliding with any person or vehicle or other conveyance on or near, or entering the highway *in compliance with legal requirements* and with the duty of all persons to use due care.

The Court agrees in its opinion that the train was not on or near, or entering the highway in compliance with legal requirements, and with the duty of all persons to use due care because, in the Court's opinion, Record Page 130, the Court says:

> "In the case at bar there is negative evidence ~~that~~ the railroad failed to sound the whistle, ring the bell,

> or turn on its head lights attached to its locomotive as it approached the crossing, although, its employees in charge of the train testified that these things were done. For the purpose of this appeal we may assume that the railroad company might probably be found negligent in those respects."

There is also no proof that plaintiff did not comply with the requirements of Sub-section (a) in driving at a reduced speed when approaching and crossing an intersection or railroad grade crossing.

It can not be assumed that the train was on or near, or entering the highway in compliance with legal requirements, and with the duty of all persons to use due care, nor can it be assumed that because a collision occurred, petitioner was operating his automobile in violation of this statute.

It is submitted that this statute is of no benefit to the defendant in this case for the reason that the burden of proof which was upon defendant was not met by any proof of facts justifying the above assumptions. Section 2-1025, Burns Indiana Statutes, 1933. In the absence of such proof, it is submitted that defendant's case cannot be predicated upon this statute.

Dommer v. *Pennsylvania R. R. Co.* (1946), 156 Fed. 2nd, page 716.

A violation of the statutory provision under discussion would not constitute contributory negligence as a matter of law. This was the holding of the Indiana Court in the case of *Coats* v. *Strawmeyer*, 107 Ind. App. 102, 21 N. E. 2nd 433, in an analogous situation. In that case, the defendant argued that the violation of a city ordinance was sufficient to establish contributory negligence as a matter of law. The Court said (107 Ind. App. at page 105, 21 N. E. 2nd, page 435):

> "The mere fact that appellee was negligent in violating such ordinance does not warrant a reversal of

> the judgment. To warrant a reversal on the grounds of appellee's negligence, it must be conclusively shown by the evidence that such negligence 'contributed' to the accident''.

Thus, the mere fact that the statute may have been violated does not establish defendant's legal proposition.

The question of contributory negligence in respect to the violation of the statute was properly submitted to the jury.

> *Dommer* v. *Pennsylvania R. R. Co.* 156 Fed. 2nd, 716, page 718.

Defendant contends that petitioner was guilty of contributory negligence as a matter of law because he operated his vehicle on a highway under such conditions that he could not see and heed warning signs erected and maintained for the protection of persons using the highway, and that he was operating his motor vehicle on the highway at a rate of speed in excess of that within which he could bring it to a stop within the range of his vision.

These conditions must be considered in connection with all attending circumstances including the fact that the railroad company failed to sound the whistle, ring the bell, or turn on its head lights attached to its locomotive as it approached the crossing, also including the fact that the circular disc warning travelers of the existence of a railroad crossing was placed 800 feet from the crossing, and that it was at this location of 800 feet from the crossing that plaintiff passed an automobile driven by one Alvin Wentworth. Petitioner submits that it was for the jury to decide under these circumstances whether or not petitioner was guilty of contributory negligence.

> *Bartley* v. *Chicago E. & I. Ry. Co.* 216 Ind. 512; 24 N. E. 2nd, 405.

Defendant's contentions in this case and the decision of the Circuit Court of Appeals, if followed to a logical conclusion would mean that the very occurrence of a collision under the circumstances as shown by this record would constitute contributory negligence as a matter of law. The Indiana Supreme Court has construed a similar statute (10-1909 Burns Indiana Statutes, 1933) contrary to defendant's position.

Heiny v. *Pennsylvania R. R. Co.* 221 Ind. 367, 47 N. E. 2nd, 145.

In the *Heiny* case the statutory language was even more stringent than the language in Section 47-2004, Burns Indiana Statutes, 1933, which was cited in the instant case by defendant.

The decision in the *Heiny* case is decisive of the issue involved here. Petitioner submits that whether a driver has used due care, is ordinarily a question for the jury, and that in Indiana it has been thought wise to submit such question to the twelve laymen composing the jury to be decided as questions of fact under proper instructions from the Court, in order that they may bring to bear their varied experiences and knowledge of men in determining what a reasonably prudent man would ordinarily do under circumstances disclosed by the evidence.

In a case such as the instant case where an experienced trial judge submitted the question to the jury, and the jury found that there was no contributory negligence on the part of plaintiff which contributed to the accident, and the trial judge let this verdict stand, that a Court of Appeals should not say that there is no room for reasonable minds to differ on any of these questions, and therefore, should not hold as a matter of law that any precaution under consideration should or should not have been observed in the exercise of due care. So, in this case, on the facts which the jury might

properly have found from the evidence, it cannot be said that reasonable minds might not have differed on the question of whether plaintiff exercised due care.

Pennsylvania R. R. Co. v. *Dove* 184 Ind. 447; 111 N. E. 609;

Bartley v. *Chicago & E. R. Ry. Co.* 216 Ind. 512; 24 N. E. 2nd, 405, Page 410.

It is respectfully submitted that the United States Court of Appeals, Seventh Circuit, erred in reversing this judgment of the District Court.

VII

Conclusion

In conclusion, counsel for the petitioner respectfully submits that because the Court of Appeals, Seventh Circuit erred by failing to follow the state statutes and decisions of Indiana on a matter of general law as required by the United States Supreme Court ruling decision (*Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64), that a writ of certiorari should be granted the petitioner; that this Court should review and reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

LORCH AND LORCH,
FRANK E. LORCH,
EVAN A. MCLINN,
517-521 Elsby Building,
New Albany, Indiana,
Attorneys for Petitioner.

Office - Supreme Court, U. S.
FILED
FEB 26 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 512

HIRAM REYNOLDS,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

E. H. BURGESS,
ROBERT C. BULLEIT,
RICHARD C. O'CONNOR,
KENNETH H. EKIN,
Counsel for Respondent.

The Daily Record Co., Baltimore 3, Md.

INDEX

TABLE OF CONTENTS

	PAGE
OPINION OF THE COURT BELOW	1
JURISDICTION	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
CONCLUSION	5

TABLE OF CITATIONS

Cases

Chesapeake & Ohio Railway Co. v. Williams, 114 Ind. App. 160, 51 N. E. 2d 384 (1943)	3
Indianapolis Street Railway Co. v. Taylor, 158 Ind. 274, 63 N. E. 456 (1902)	3, 4
Lake Erie and Western Railroad Co. v. McFarren, 188 Ind. 113, 122 N. E. 330 (1919)	4
Moss v. Pennsylvania Railroad Co., 146 F. 2d 673 (C. A. 7) cert. den. 325 U. S. 861 (1945)	3
Pitcairn et al. v. Honn, 109 Ind. App. 428, 32 N. E. 2d 733 (1941)	3
Reynolds v. The Baltimore & Ohio Railroad Co., 185 F. 2d 27 (C. A. 7, 1950)	1, 2, 4

Statutes

Burns Indiana Statutes, 1933, Sec. 2-1025, Acts 1899, Ch. 41, Sec. 1, p. 58	3
28 U. S. C. Sec. 1254, 62 Stat. 928	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 512

HIRAM REYNOLDS,

Petitioner,

VS.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in *Hiram Reynolds v. The Baltimore and Ohio Railroad Company*, 185 F. 2d 27, (C. A. 7, 1950). It will also be found at page 127 of the Record.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 U. S. C., Sec. 1254, 62 Stat. 928.

STATEMENT OF FACTS

In amplification of the Petitioner's Statement of Facts which incorporates by reference paragraph B, page 2 of the Petition for writ of certiorari, attention is called to the fact that the United States Court of Appeals, in reversing the judgment of the District Court, held on an examination of the entire Record, that Petitioner, who drove his auto-

mobile into a locomotive at a railroad grade crossing, was guilty of contributory negligence as a matter of law in failing to see or heed warnings of the existence of the crossing and in failing to so control his automobile that he could bring it to a stop within the range of his vision (R. 132).

SUMMARY OF ARGUMENT

The Court of Appeals correctly decided the case under the law of Indiana in holding that where contributory negligence has been affirmatively proven as a matter of law, a plaintiff is not entitled to judgment.

ARGUMENT

Petitioner, in his brief in support of the Petition for writ of certiorari (2nd paragraph, p. 9 to the Conclusion, p. 13), has undertaken a review of the findings of the Court of Appeals, and to argue therefrom that the Court was in error in holding the Petitioner guilty of contributory negligence as a matter of law. It is submitted that this argument is not addressed to the sole question presented by the Petition (paragraph C, p. 2) and is, in fact, an argument on the merits of the case presented by the entire Record.

In essence, Petitioner's argument upon the question presented rests upon the ground that the Court of Appeals decided the case upon the question of which party has the burden of proof of contributory negligence. This is a repetition of the grounds advanced by the Petitioner in his Petition for re-hearing addressed to the Court of Appeals (R. 137) and rejected by that Court (R. 143). To sustain his position, attention is directed to one sentence in the Court of Appeals' Opinion (R. 130).[1] If this statement had been

---

[1] *Reynolds v. The Baltimore and Ohio Railroad Co.*, 185 F. 2d 27, 29.

"Under that law [Indiana], plaintiff as a prerequisite to recovery is required to show that at the time and place of the accident he was

directed to the burden of proof of contributory negligence and the case decided on that ground, Petitioner's position would be well taken. That this was not the view of the Court of Appeals becomes abundantly clear upon a reading of the entire Opinion (R. 127-132).

It is agreed that under the law of Indiana, as in most jurisdictions, the burden of proof of contributory negligence is upon the defendant. *Acts of 1899*, Ch. 41, Sec. 1, p. 58. *Burns Indiana Statutes, 1933*, Sec. 2-1025.[2] It is equally clear that where evidence establishes contributory negligence as a matter of law, a verdict will be directed for the defendant. *Moss v. Pennsylvania Railroad Co.*, 146 F. 2d 673 (C. A. 7), cert. den. 325 U. S. 861 (1945); *Chesapeake & Ohio Railway Co. v. Williams*, 114 Ind. App. 160, 51 N. E. 2d 384 (1943); *Pitcairn et al. v. Honn*, 109 Ind. App. 428, 32 N. E. 2d 733; *Indianapolis Street Railway Co. v. Taylor*, 158 Ind. 274, 63 N. E. 456 (1902).[3]

The plain intent of the statute is that where there is no evidence on the subject of contributory negligence of the plaintiff, the finding of the Court must be against the defen-

---

in the exercise of due care and caution for his own safety, or in other words, that he was free from negligence which contributed to cause the accident."

[2] That the provisions of this statute were well known to the Court of Appeals is demonstrated by the fact that Judge Kerner cited the statute in his dissenting opinion in *Moss v. Pennsylvania Railroad Co.*, 146 F. 2d 673 (1945).

[3] In the Indianapolis Street Railway case, decided four years after the passage of the Indiana statute referred to, *supra*, the Court stated, page 279:

"While under said act [Burns Indiana Statutes 1933, 2-1025] the burden of proving contributory negligence of the plaintiff is upon the defendant, yet, if such negligence is shown by the evidence given on behalf of the plaintiff, it is as effective as if proved by the defendant; and there can be no recovery in such case. This being true, if it affirmatively appeared from the evidence that appellee was guilty of contributory negligence, it was not material who had the burden of proof; * * *."

dant on that issue because the defendant has the burden of proof. If, however, there is no dispute as to the controlling facts or inferences to be drawn therefrom, then the question of contributory negligence becomes a matter of law for the Court. *Lake Erie and Western Railroad Co. v. McFarren,* 188 Ind. 113, 122 N. E. 330 (1919). Once evidence of contributory negligence has been established in a case, whether by the plaintiff or defendant, the statute here invoked, relating as it does to the burden of proof, no longer controls the determination of the issue of plaintiff's contributory negligence. The Court is then free to determine from the facts and the inferences to be drawn therefrom the question of plaintiff's guilt of contributory negligence as a matter of law. *Indianapolis Street Railway Co. v. Taylor,* 158 Ind. 274, 63 N. E. 456 (1902).

The Court of Appeals not only did not decide the case on the question of burden of proof, but has been meticulous in following the law of Indiana in according to the Petitioner every presumption and inference favorable to his cause, yet has reached the conclusion, based upon positive testimony, that he was guilty of contributory negligence as a matter of law (R. 132).[4]

For the aforegoing reasons, we submit that the decision of the Court of Appeals is in conformity with the law of the State of Indiana.

---

[4] *Reynolds v. The Baltimore and Ohio Railroad Co.,* 185 F. 2d 27, 30.

"Because of the serious injuries sustained by the plaintiff, we have examined the whole record taking as true all the facts favorable to the plaintiff and drawing all inferences which might reasonably be drawn against the defendant. From such examination we are convinced that, under the facts and circumstances disclosed in this record, plaintiff's failure to see and heed the warnings that a railroad crossing existed a short distance ahead on his line of travel, together with his failure to so operate and control his automobile that he could bring it to a stop within the range of his vision, constituted negligence as a matter of law."

CONCLUSION

As the Court of Appeals' reference to the law of Indiana governing negligence of a party plaintiff was not intended to relate to the question of burden of proof which was not decisive of the issue, and as its decision was based upon positive evidence of contributory negligence, it is respectfully submitted that the judgment of that Court was correct and, accordingly, this Court should deny its writ of certiorari to review the same.

Respectfully submitted,

E. H. BURGESS,
ROBERT C. BULLEIT,
RICHARD C. O'CONNOR,
KENNETH H. EKIN,
Counsel for Respondent.

February, 1951